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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE DEJESUS JAIMES, Defendant and Appellant.	H033620 (Santa Clara County Super. Ct. No. CC765987)

I. STATEMENT OF THE CASE

A jury found defendant Jose DeJesus Jaimes guilty of lewd conduct with a child under 14 years old, rape, and oral copulation by force and further found true enhancement allegations that each offense occurred during the commission of a burglary and that the offenses involved more than one victim. (Pen. Code §§ 288, subd. (a), 261, subd. (a)(2), 288a, subd. (c)(2), 667.61, subds. (a), (b), (d), & (e).) The court sentenced defendant to prison for a term of 50 years to life.

On appeal from the judgment, defendant claims the court erred in admitting evidence of an uncharged act and inadequately instructing the jury on the burglary enhancement.

We affirm the judgment.

II. FACTS

Defendant is S.'s uncle. In April 2007, defendant and his daughter and her cousin visited S.'s family. They ended up staying overnight. Defendant slept in the living room. S. slept in her own room. Defendant's daughter and her cousin slept in S.'s younger sister V.'s room, and V. slept with her parents. That night, 11-year-old S. woke up when she felt defendant touching her vagina and breasts underneath her clothing. When she turned on the light, she saw him crawl out of the bed and leave her room. S. immediately told her mother, who immediately kicked defendant out of the house and called the police. Later, the police arranged for S.'s mother to make a pretext call to defendant, during which he admitted touching S.'s breast and vagina but said it was over, not under, her clothing.

For several months from 1997 to 1998, defendant lived with the family of A., who is S.'s cousin. Defendant was considered part of the family. To accommodate defendant, A. and her family slept in one of the bedrooms; defendant slept in the other along with his cousin Mario. A., who was 15, had known defendant all her life, but after he started living in the house, his touching, under the guise of affection, made her uncomfortable. His looks felt to her like threats to not say anything.

A., who slept with her sister on a sheet on the bedroom floor, woke one morning to find defendant fondling her. When she tried to move, defendant held her, tried to kiss her, and told her to be quiet. He pulled her pajamas pants down and raped her. He then orally copulated her. A. was afraid and did not make any noise because she did not want to wake her sister. When he was finished, he pulled her pants back up and crawled out of the room. A. did not immediately tell anyone what had happened.

Some months later, A. wrote about the sexual abuse in a letter that she did not mail. Her mother found and read it. A. then told her about the rape. However, she did not want to report it to the police because defendant was like a family member.

After the 2007 incident between defendant and S., A. told S.'s mother that defendant had raped her. A. was angry and upset and felt guilty for not having reported defendant sooner because she might have been able to prevent defendant from touching S.

Uncharged Conduct

One morning about a month after the rape, A.'s parents woke her and told her to hurry or she would be late for school. While she was taking a shower, defendant entered the bathroom, locked the door, and tried to open the shower door. A. screamed, and her parents ran to the bathroom. A.'s father tried to open the door, but it was locked, so he kicked it open. The shower was running, and A. was trying to cover herself. She looked scared. Defendant told A.'s parents that he was still drunk from the night before and had entered the bathroom to urinate. Defendant did not seem drunk to A. or her father. Defendant was told to move out, which he did a few days later.

The Defense

Defendant denied touching or talking to A. in an inappropriate way. He admitted entering the bathroom while A. was showering, but he denied locking the door. He said the shower was not running when he entered, and so he did not know she was there until she said something.

Defendant also denied molesting S. He said he thought his daughter was sleeping in S.'s room. He entered it very early in the morning, when it was still dark, to get her and her cousin. He called her name and tried to wake her by patting her leg and stomach. However, he was mistakenly patting S., who called out. He admitted that during the pretext call, he said he was "ashamed," but he explained that he only meant to apologize for the confusion that night.

Defendant's daughter testified that he usually wakes her by ticking her and patting her stomach and legs. She also corroborated his testimony about where he thought she

was sleeping. She explained that she had changed rooms during the night without telling him.

IV. EVIDENCE OF THE SHOWER INCIDENT[1]

Defendant contends the court erred in admitting evidence of the shower incident.

Background

Before trial, defense counsel objected to the shower incident and argued that it was not admissible under either section 1101, subdivision (b) to prove motive, intent, or some other material fact; or section 1108 to prove a disposition to commit the charged offenses.[2] The court overruled the objection, found the evidence admissible under both sections, and admitted it. Later, when the parties discussed instructions, defense counsel requested only that the court instruct on section 1108. The prosecutor agreed that that the CALCRIM instruction for section 1108 was correct but noted that the evidence was admissible under both sections 1108 and 1101, subdivision (b). The court gave the requested instruction under section 1108. Neither party requested instruction under section 1101, subdivision (b).

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[1] In this section, all unspecified statutory references are to the Evidence Code.

[2] Section 1101 provides, in relevant part, "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Section 1108 provides, in relevant part, "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

In his opening brief, defendant claims the evidence was not admissible under section 1108. The Attorney General argues that it was admissible under both sections 1108 and 1101, subdivision (b). In his reply brief, defendant counters that the evidence was also not admissible under section 1101, subdivision (b).

Section 1108

Section 1108 is an exception to the general prohibition against admitting character evidence to prove a criminal disposition or propensity. (See § 1101, subd. (a).) The statute states that in a prosecution for a sexual offense, evidence that the defendant committed an offense enumerated in one of its subdivision is admissible to show a propensity to commit such offenses provided the evidence is also admissible under section 352. (See fn. 2, *ante*; *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013.) Thus, the admissibility of evidence turns on (1) whether the evidence shows that defendant committed an enumerated offense; and (2) whether it is more probative than prejudicial. (§ 352.) Accordingly, the trial court must make a preliminary determination that the evidence is sufficient to support a finding that the defendant committed an enumerated offense. (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 115 (*Garelick*) [the truth of the prior uncharged act is preliminary factual issue that must be decided before admitting it]; *People v. Simon* (1986) 184 Cal.App.3d 125, 132-134 [same]; e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 382 [evidence was sufficient to support finding that defendant committed uncharged murders and rape admitted under § 1101, subd. (b)]; see Evid.Code, § 403, subd. (a) [determination of preliminary facts].)

Here, the prosecutor argued that the shower incident reflected an attempted rape, which is one of the statutorily enumerated offenses. (§ 1108, subds. (d)(1)(A) & (F).)

Rape "is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator" under one or more of certain statutorily prescribed circumstances. (Pen. Code, § 261.) "An attempt to commit rape has two elements (see [Pen. Code,] § 664):

the specific intent to commit rape, and a direct but ineffectual act done towards its commission. [Citation.] Such act cannot be merely preparatory, and must constitute direct movement towards completion of the crime. [Citation.] However, attempted rape does not necessarily require a physical sexual assault or other sexually ' "unambiguous[ ]" ' contact. [Citations.]" (*People v. DePriest* (2007) 42 Cal.4th 1, 48; *People v. Rundle* (2008) 43 Cal.4th 76, 138, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In *People v. Tidmore* (1963) 218 Cal.App.2d 716 (*Tidmore*), a woman heard noise in her bedroom one night and saw the dresser move. She turned on the light and saw the defendant, who appeared to be entering a window. He did not say anything. She screamed, fled to the kitchen, and returned with a knife, but he was gone. The court found this evidence insufficient to support a finding of unlawful entry with intent to commit rape. (*Id*. at p. 718.)

In *People v. Greene* (1973) 34 Cal.App.3d 622 (*Greene*), the defendant approached the victim on the street, put his hand around her waist, said he had a gun, and told her not to be afraid. He made her put her arm around his waist as they walked and said he just wanted to play with her. She broke free and escaped to a neighbor's house. The court found this evidence, by itself, insufficient to support a finding of assault with intent to commit rape. (*Id.* at p. 629, 651-652.)

In this case, the evidence revealed that defendant entered the bathroom one morning while A. was taking a shower, locked the door, and then tried to open the shower door. These circumstances reasonably support an inference that defendant entered with some unlawful sexual intent. However, they no more support a finding of intent to rape than did the facts in *Tidwell* or *Greene*. Indeed, without more, they no more reveal an intent to rape than an intent to sodomize, orally copulate, assault, fondle, annoy, expose himself to, or simply leer at A. Thus, to find a specific intent to commit

any of these acts, jurors would have to arbitrarily guess which one it was from among equally possible alternatives.

In *People v. Perez* (1992) 2 Cal.4th 1117 (*Perez*), the court explained that " '[t]o be sufficient, evidence must of course be substantial. It is such only if it " 'reasonably inspires confidence and is of "solid value." ' " By definition, "substantial evidence" requires *evidence* and not mere speculation. In any given case, one "may *speculate* about any number of scenarios that may have occurred . . . . A reasonable inference, however, may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." ' "[3] (*Id*. at p. 1133; *People v. Blackwell* (1961) 193 Cal.App.2d 420, 425 ["That the circumstances were suspicious may be conceded, but mere surmise and conjecture are not enough."].)

Here, the evidence is not sufficient to support an inference that defendant entered the bathroom with the specific intent to rape A. even under a preponderance-of-the-evidence standard. Accordingly, we conclude that the court abused its discretion in admitting the evidence under section 1108. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917-919 [admission of evidence reviewed for abuse of discretion.) We further conclude, however, that the error was harmless.

The court instructed the jury generally that "[s]ome of [the] instructions may not apply, depending on your findings about the facts of this case. [¶] Do not assume just

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[3] Although the *Perez* involved the sufficiency of evidence to support factual findings under the reasonable-doubt standard whereas the preponderance-of-the-evidence standard governs the determination of whether a defendant's uncharged conduct constitutes an enumerated offense (*People v. Carpenter*, *supra*, 15 Cal.4th 312, 380-382), the *Perez* court's explanation of the "substantial evidence" test applies equally to the review of a finding that need only be based on a preponderance of the evidence. (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1444.)

because I give a particular instruction that I am suggesting anything about the facts." Then, concerning the shower incident, the court instructed that the prosecutor had presented evidence that defendant committed the crime of attempted rape; the evidence could be considered only if the prosecutor proved by a preponderance of the evidence that defendant committed that offense; and to do so, the prosecutor had to prove that defendant intended to commit rape.

We presume the jury followed the court's instruction concerning factually inapplicable instructions. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) Thus, because there is no evidence to support a finding that defendant intended to rape A. in the shower, even under a preponderance of the evidence standard, we question whether the jury could, or would, have concluded that the prosecution had proved that defendant committed an attempted rape and then considered the shower incident as evidence of a disposition to commit rape. (Cf., e.g., *People v. Lucas* (1997) 55 Cal.App.4th 721, 733-734 [where prosecution is based multiple theories, one of which is factually inadequate, we presume general verdict based on factually supported theory, unless record shows otherwise]; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129 [jury is well equipped to determine whether facts exist to support a theory or instruction].)

This is especially so in light of the prosecutor's feeble argument in support of his theory of attempted rape. According to the prosecutor, jurors could infer that defendant intended to rape A. in the shower from her testimony that he had previously raped her in the bedroom, and upon inferring that he intended to rape her in the shower, they could use that inference to prove that he had previously raped her in her bedroom. Defense counsel exposed the prosecutor's faulty circular logic, calling it "[a] classic bootstrap argument" and correctly noted, "You have to look at each crime separately. And you have to look at the bathroom incident and determine whether there was the intent to

commit the rape." Moreover, defense counsel argued that the evidence did not even show an attempted rape in the bathroom, and, therefore, it should be disregarded.

In any event, the jury properly learned about the shower incident because it was alternatively admissible under section 1101, subdivision (b) to prove motive and intent and lack of accident or mistake.[4]

Section 1101, subdivision (b), unlike section 1108, does not limit evidence of uncharged conduct to specifically enumerated crimes. Rather, any type of uncharged misconduct is admissible if it is relevant to establish, for example, the defendant's motive, knowledge, or intent or to rebut a claim that the charged conduct was accidental or a mistake. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*).)

To be relevant, uncharged misconduct must be sufficiently similar to the charged offense to support a rational inference concerning the fact it is offered to prove. (*Ewoldt, supra*, 7 Cal.4th at p. 402.) However, the least degree of similarity is required to prove motive or intent or lack of mistake. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.)

For example, in *People v. Miller* (2000) 81 Cal.App.4th 1427 (*Miller*), the defendants were charged with grand theft by false pretenses. One of the defendants, a woman, approached an elderly man; falsely portrayed herself as a single, virgin living alone; gained his confidence; and, over time, obtained goods and money from him. The trial court admitted evidence that the woman had on other occasions approached three other elderly men, said she was alone and without money, sought to befriend them, and acted suspiciously. Although the defendant did not obtain anything from these other men, the preliminary conduct was sufficiently similar to the charge offenses to be admitted to prove the charged acts were committed with the intent to defraud. (*Id.* at pp. 1447-1448.)

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[4] Although the court did not give a limiting instruction under section 1101, subdivision (b), it had no sua sponte duty to give one. (*People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3.)

In *People v. Whisehunt* (2008) 44 Cal.4th 174 (*Whisehunt*), the defendant was charged with murdering his girlfriend's daughter. The trial court admitted a former girlfriend's testimony that the defendant had used non-lethal force against her two children to show that the defendant intended to inflict the victim's injuries and rebut his claim that they were accidental. (*Id*. at p. 204.)

In *Garelick, supra*, 161 Cal.App.4th 1107, the defendant was charged with possessing child pornography based on four images on his computer. The court admitted numerous other images found in different locations of the computer that were suggestive of child pornography and thus sufficiently similar to the four pornographic images to prove the defendant's knowledge of the four images and diminish likelihood that their presence on his computer was inadvertent. (*Id*. at pp. 1115-1116.)

Here, defendant entered S.'s bedroom at night and touched her breast and vagina. On a different night, he entered the bedroom where A. and the rest of her family were sleeping and raped and orally copulated her. In the uncharged incident, defendant entered the bathroom while A. was taking a shower. He locked the door and started to open the shower door. In our view, the charged and uncharged conduct in this case was no less similar than the charged and uncharged conduct in *Miller*, *Whisehunt*, and *Garelick*. Two of the incidents involved the same girl, and all three girls had close, if not familial-type relationships, with defendant. In all three incidents, defendant was at the time sleeping in the same house with the girls. And in all three incidents, defendant entered rooms at a time when they could expect privacy from defendant and under circumstances where the girls would be unsuspecting and vulnerable. Last, defendant's conduct in the shower incident supports an inference that he harbored the intent to commit a some sort of sexual misconduct.

We conclude that the similarities between the charged and uncharged conduct were sufficient to render the shower incident relevant to show that defendant intended to

commit the charged unlawful sexual acts in the bedrooms and, concerning S., to negate his claim that he innocently entered the room and touched her in the mistaken belief that he was waking his daughter. (Cf. *People v. Pendleton* (1979) 25 Cal.3d 371, 377.))

We acknowledge that relevance by itself does not automatically ensure the admission of uncharged misconduct. Rather, the evidence must also pass muster under section 352, in that, its probative value must not be "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

" 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Evidence is more prejudicial than probative under section 352 when " 'it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." [Citation.]' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.)

Defendant argues that the evidence was prejudicial because A., her mother, and her father testified about the shower incident; the prosecutor made it the "centerpiece" of his opening statement and closing argument; there was a "significant danger" it would distract jurors from the main inquiries; the incident was highly inflammatory; and it was ambiguous concerning whether it constituted a sexual offense.

Defendant also notes that the jury deliberated for 11 hours, asked the court what would happen if it agreed on one count but could not agree on the other, and requested several readbacks of testimony. He argues that it was highly likely the jury was having difficulty deciding the two counts involving A., which was a weaker case than the case involving S. We are not persuaded.

Testimony about the incident comprised only 15 of the 74 pages of testimony by the three witnesses, and the prosecutor discussed it for only seven of his 41-page final argument. Compared with the testimony about the charged offenses, the shower incident did not represent the centerpiece, or even the primary focus, of the prosecution. Nor, in our view, did it pose a potentially significant distraction from the direct evidence of the offenses and the determination of guilt. Furthermore, although the shower incident supported an inference that defendant intended to some sort of sexual misconduct, he did not actually do anything but startle A., and his conduct was far less inflammatory than S.'s and A.'s direct testimony about how defendant came into their bedrooms, touched, raped, and/or orally copulated them.

Moreover, without more, the length of deliberations and a request for readbacks do not invariably indicate that the case was close or compel the conclusion that the jury thought so; such jury conduct is equally reconcilable with the jury's conscientious performance of its duty. (*People v. Houston* (2005) 130 Cal.App.4th 279, 301.)

In sum, we conclude that any prejudice from the court's erroneous ruling to admit the shower incident under section 1108 was de minimus because the evidence was alternatively admissible under section 1101, subdivision (b) to prove intent and rebut defendant's claim of mistake. In other words, had the trial court correctly found the evidence was not admissible under section 1108, it would still have admitted it, and the jury would have learned about the shower incident and been able to consider it.

In this regard, we note that although the court's instruction under section 1108 informed jurors that the evidence might be relevant to show disposition and could be considered in determining guilt and credibility, neither the prosecutor nor defense counsel discussed the shower incident as evidence of disposition. Rather, they discussed the shower incident as evidence of intent and defendant's lack of credibility.

Thus, during his opening argument, the prosecutor specifically argued that the incident "is evidence of sexual intent in the charged crimes" and "evidence of the defendant's lack of credibility." He stressed that the evidence "has only a limited purpose" of "showing that [defendant] intended to commit the charged crimes."

As noted, defense counsel urged jurors to disregard the incident because it did not show of an attempt to commit rape or intent to commit any crime for that matter.

Finally, we note that defendant admitted during the pretext call that he touched S.'s breast and vagina. And although he did not repeat that admission at trial, he admitted that he entered S.'s room and touched her, albeit thinking she was his daughter.

Under the circumstances, we do not find it reasonably probable that defendant would have obtained a more favorable result in the absence of the trial court's erroneous ruling. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Citing *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 (*McKinney*), defendant claims the error rendered his trial fundamentally unfair and thereby violated his federal constitutional right to due process. He argues that the error compels reversal because it was not harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [standard of review for federal constitutional error].) We disagree.

Ordinary errors in admitting or excluding evidence do not implicate the federal constitutional right to due process and are instead reviewable under *People v. Watson, supra,* 46 Cal.2d 818, 836. (See *People v. Harris* (2005) 37 Cal.4th 310, 336; *People v. Marks* (2003) 31 Cal.4th 197, 226-227; e.g., *People v. McFarland* (2000) 78 Cal.App.4th 489, 496 [error in admitting evidence of propensity]; *People v. Harris* (1998) 60 Cal.App.4th 727, 741 [same].) Given the admissibility of the evidence under section 1101, subdivision (b) and our discussion of potential prejudice under section 352, we do not find that the court's erroneous ruling under section 1108 rendered the trial fundamentally unfair.

Defendant's reliance on *McKinney, supra*, 993 F.2d 1378 does not persuade us otherwise. There, the victim's throat was slit with a knife that was never found. However, the prosecution introduced extensive, emotionally charged testimony concerning the defendant's fascination with knives, his collection of knives, and his use of a knife to carve "Death is His" on his closet door. However, this evidence was not relevant to, or admissible to prove, any issue except character and disposition; and, because the case against the defendant was circumstantial and weak, the court concluded that admitting the evidence rendered the trial fundamentally unfair. (*Id.* at pp. 1381-1386.)

McKinney does not stand for the proposition that the erroneous admission of evidence to show disposition invariably renders a trial unfair. And even if it did, *McKinney* is not binding on us, and we would decline to follow such a rule. (See *People v. Williams* (1997) 16 Cal.4th 153, 190 [lower federal court's not binding authority].) Finally, even if we accept the notion that in some rare cases, such as *McKinney*, the erroneous admission of evidence may violate due process, the circumstances of this case are vastly different from those in *McKinney*. The case against defendant was not circumstantial; rather both victims testified that defendant committed the charged offenses. Furthermore, in *McKinney*, the inadmissible evidence provided a compelling substitute for the missing murder weapon. Here, the shower incident did not provide a compelling substitute for some missing evidence of the charged crimes.

V. INSTRUCTION ON THE BURGLARY ENHANCEMENT[5]

Defendant contends that the court failed to give complete instructions concerning the burglary enhancement.

[5] In this section, all unspecified statutory references are to the Penal Code.

As noted, defendant was charged with enhancements under section 667.61, subdivision (a)—commission of a sexual offense during a burglary.[6] The prosecution's theory was that each entry into one of the girls' bedrooms with the intent to commit a sexual felony constituted a burglary.

In connection with the enhancement allegations, the court instructed the jury that if it found defendant guilty of the substantive charges, then for each, it had to further decide whether he committed the offense during a burglary. "To prove this allegation, the People must prove that: [¶] One, the defendant entered an inhabited room within an inhabited house. [¶] Two, when the defendant entered the room within the house, he intended to commit the [charged crimes]. [¶] And, three, after the defendant entered the room within the house, he committed [the charged crimes]."

Defendant contends that the court's instruction omitted an essential element of burglary—i.e., that the defendant not have an unconditional right to enter the premises. He further argues that the omission of this element was prejudicial and compels that the enhancements be reversed.

Defendant's claim is based on the holding in *People v. Gauze* (1975) 15 Cal.3d 709 (*Gauze*) and its progeny. There, the defendant was convicted of burglary based on his entry of the apartment he shared with another person to assault him. In reversing the conviction, the California Supreme Court explained that section 459, the burglary statute, retains two aspects of the common law offense: "A burglary remains an entry which

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[6] Section 667.61, subdivision (a) provides, "Any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life." Lewd conduct, rape, and oral copulation are among the specified offenses. (Pen. Code, § 667.61, subds. (c)(1), (c)(7), & (c)(8).) Commiting the offense during commission of a residential burglary is among the specified circumstances. (Pen. Code, § 667.61, subd. (d)(4).)

invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building." (*Id*. at p. 714.) Accordingly, the court held that the "defendant cannot be guilty of burglarizing his own home. His entry into the apartment, even for a felonious purpose, invaded no possessory right of habitation; only the entry of an intruder could have done so. More importantly, defendant had an *absolute* right to enter the apartment. This right . . . did not derive from an implied invitation to the public to enter for legal purposes. It was a personal right that could not be conditioned on the consent of defendant's roommates. Defendant could not be 'refused admission at the threshold' of his apartment, or be 'ejected from the premises after the entry was accomplished.' [Citation.] He could not, accordingly, commit a burglary in his own home." (*Ibid*., italics added.)

In *People v. Pendleton, supra,* 25 Cal.3d 371, the court addressed a claim that a person who enters the premises with the owner's permission does not invade the owner's possessory right or habitation' and, therefore, like a person who enters his own residence, he or she cannot be convicted of burglary. In rejecting this claim, the court noted that *Gauze* dealt only with whether one could be convicted of burglarizing one's own home and did not "overrule existing authority upholding burglary convictions in which there was consensual entry. The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an *unconditional possessory right* to enter." (*Id*. at p. 382, italics added.)

In *People v. Superior Court (Granillo)* (1988) 205 Cal.App.3d 1478, however, the court qualified that rule, holding that even if one does not have an unconditional possessory right to enter, one cannot be convicted of burglary if the owner consented to entry knowing and endorsing the invitee's felonious purpose. (*Id*. at pp. 1483-1486.)

In *People v. Salemme* (1992) 2 Cal.App.4th 775, the court summed up all of these principles this way: "since burglary is a breach of the occupant's possessory rights, a

person who enters a structure enumerated in section 459 with the intent to commit a felony is guilty of burglary *except* when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent. (*Id*. at p. 781.)

With these principles in mind, we turn to defendant's claim. He provides no direct authority holding that the lack of an unconditional right of entry is an essential element of burglary or that a court has duty in every case to instruct sua sponte that the prosecution has the burden to prove the lack of such a right. Nor are we aware of any such authority. To the contrary, in *People v. Ulloa* (2009) 180 Cal.App.4th 601 (*Ulloa*) and *People v. Felix* (1994) 23 Cal.App.4th 1385 (*Felix*), the existence of a such a right was treated as a defense concerning which trial courts have no duty to instruct in the absence of a request and evidentiary support. (See *People v. Martinez* (2010) 47 Cal.4th 911, 953 [explaining when court has a duty to instruct on defense].)

In *Ulloa, supra*, 180 Cal.App.4th 601, the defendant and his wife were co-signatories on the lease of an apartment which they shared for a while but which the defendant vacated after their separation. Defendant later broke into the apartment and stole money from her. He was convicted of burglary, and on appeal, he claimed the trial court should have granted his motion for judgment acquittal because his possessory rights under the lease constituted an absolute defense to the crime; alternatively he claimed the trial court erred in failing to instruct on principles related to his possessory right to enter. (*Id*. at p. 603-605.) In affirming the burglary conviction, the court explained that even though defendant may have retained a possessory interest in the apartment under the lease, that interest "was not a complete defense to the burglary charge because there was substantial evidence he had moved out of the apartment prior to the crimes and therefore no longer had an *unconditional* possessory interest in the apartment unit." (*Id*. at pp. 606-607.)

In *Felix, supra,* 23 Cal.App.4th 1385, the defendant was convicted of entering and taking items from his sister Beatrice's residence. Although before trial she denied that he had permission to enter, at trial she said that he had implicit permission to come and take anything inside that he wanted. (*Id*. at pp. 1391-1392.) On appeal, the defendant claimed the court erred in failing to instruct the jury sua sponte that Beatrice's permission to enter and take his property constituted a defense to burglary; alternatively, he claimed counsel was incompetent in failing to request that instruction. (*Id*. at p. 1396.)

In affirming the judgment, the court explained that burglary requires evidence that the accused entered the residence with the specific intent to steal, take and carry away the personal property of another of any value and with the specific intent to deprive the owner permanently of such property. The court further explained that a lack of consent, which would necessarily encompass the lack of a right to enter, is not an element of the offense. "The reason is quite simple: if lack of consent were an element of the offense, no one could be prosecuted for burglarizing a business during store hours. [Citation.] The question in this case, however, is the converse of this rule: does an implicit, after-the-fact consent constitute an automatic defense to the charge of burglary? We answer this in the negative and, therefore, no sua sponte instruction was required." (*Felix, supra,* 23 Cal.App.4th at p. 1397.)

In support of his claim, defendant cites *People v. Smith* (2006) 142 Cal.App.4th 923 (*Smith*), *People v. Davenport* (1990) 219 Cal.App.3d 885 (*Davenport*), and *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704 (*Fortes*).

However, these cases do not suggest that lack of a right to enter is an element of burglary; nor did any of these cases address or involve that issue. Moreover, defendant relies on these cases only for the proposition that to sustain a burglary conviction, the prosecution must prove that a defendant does not have an unconditional possessory right to enter his or her family residence.

Smith and *Davenport* do make that very statement. (*Smith, supra,* 142 Cal.App.4th at p. 930; *Davenport, supra,* 219 Cal.App.3d at p. 892.) We observe that *Smith* merely cites *Davenport* and *Fortes* without discussion; *Davenport* cites only *Fortes* without discussion; but *Fortes* is not apposite authority for the proposition that *Smith*, *Davenport,* and defendant purport to extract from it.

In *Fortes, supra,* 113 Cal.App.3d 704, the defendant was charged with burglary based on evidence that he entered the home he had shared with his wife and shot a man. The wife invoked her privilege not to testify against the defendant, her husband. (Evid. Code, §§ 970, 971.) The prosecutor asserted the statutory exception applicable in criminal proceedings, where the defendant spouse is charged with a crime against a third person that was committed *during the commission of a crime against the other spouse*. (Evid. Code, § 972, subd. (e)(2).) The theory was that the defendant committed the killing during a burglary against his wife. (*Fortes, supra*, 113 Cal.App.3d at pp. 706-708.) The reviewing court explained that the prosecutor bore the preliminary burden to show that the exception applied, more specifically, to make a prima facie factual showing that there was a burglary. (*Fortes, supra*, 113 Cal.App.3d at pp. 710-712.) The court held that the prosecution could not meet that burden because it had stipulated that the defendant entered the family house; and under *Gauze*, he could not burglarize his own home.

Thus, *Fortes* does not support the broad proposition stated in *Smith* and *Davenport* and cited by defendant that *to obtain a conviction*, the prosecution must prove that the defendant lacked an unconditional right to enter. Nor does *Fortes* suggest that lack of such a right is an element of burglary.

Last, even the broad proposition on which defendant relies—i.e., that the prosecution has to prove lack of an unconditional right—does not necessarily mean, let alone establish, that lack of a right is an essential element of burglary. Given the views in

Ulloa and *Felix* that knowing consent or an unconditional possessory right to enter represents a defense, it would follow that where a defendant introduces some evidence that reasonably supports the defense, the prosecution would then have to negate it by proving that the defendant lacked an unconditional right to enter.

In sum, defendant fails to convince us that the lack of an unconditional right of entry is an element of burglary.

Moreover, regardless of whether instructions concerning the right of entry or lack thereof relate to a defense or simply represent pinpoint instructions, there was insufficient evidence here to warrant giving them. Indeed, defense counsel did not submit or request any such instructions. He did not suggest that defendant could not have committed burglary because he had an unconditional possessory interest in the premises and right to enter the girls' bedrooms. Nor did he suggest that defendant had express and knowing permission to enter their rooms for *any* purpose, including the commission of a sexual offense. Rather, the only defense to the burglary enhancement was implicit defendant's general denial that he did not commit the unlawful acts and, therefore, did not enter the bedrooms with the intent to do so.

As noted, the basic principle underlying a right-of-entry defense to burglary derives from the principles articulated in *Gauze, Pendleton, and Granillo,* that one cannot be guilty of burglary where he or she has an unconditional—i.e., *absolute*—right to enter the premises *even for a felonious purpose*, such as the possessory right of an owner to enter his or her own home; or where one enters with the owner's express consent and also the owner's knowledge and endorsement of the felonious intent.

Here, there is no evidence that defendant had a legal possessory interest in the homes where he committed his offenses. Rather, it is undisputed that defendant had stayed at both S.'s and A.'s homes as an invited guest. At S.'s house, he was an overnight guest. But after S. told her mother about being molested, her mother kicked

defendant out. At A.'s house, he lived with the family for a while as a quasi-family member. Nevertheless, the undisputed evidence established that he was a guest, whose rights derived solely from A.'s parents' continued permission to be there, a right they could withdraw it at any time. Indeed, after the shower incident A.'s parents told him to move out. Defendant had no legal or equitable possessory interest in the premises to refuse, object, or complain. Thus, although defendant may have enjoyed a right to enter various rooms in each house based on implied permission, there is no evidence that this right or permission was unconditional, absolute, and unqualified such that he could enter any room for any purpose, including the felonious purpose of molesting S. and A. Nor, conversely, is the evidence of his status as a guest sufficient to raise a reasonable doubt concerning whether he lacked an unconditional right.

Indeed, even assuming for purposes of argument only that the court erred in failing to instruct on an element of burglary, the lack of any evidence to support a finding that defendant had an *unconditional* right to enter the girls' bedrooms or even to raise a reasonable doubt concerning whether he lacked an unconditional right would render the error harmless beyond a reasonable doubt. (See *Neder v. United States* (1999) 527 U.S. 1, 8-11 [standard of review for failure to instruct on an element of an offense].) Simply put, the undisputed evidence that defendant was an invited guest and was kicked out after being suspected of misconduct constitutes overwhelming evidence that he lacked an unconditional right to enter the girls' room for any purpose, including a felonious purpose. Given the lack of evidence to the contrary, no rational juror could have found otherwise.

VI. DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

_____
ELIA, J.